

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	File Number EB-02-TP-534
)	
Timothy J. Massett)	NAL/Acct. No.200332700012
2753 Downing Street)	
Jacksonville, Florida)	FRN 0007965379

FORFEITURE ORDER

Adopted: May 20, 2004

Released: May 24, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“Order”), we issue a monetary forfeiture in the amount of one thousand dollars (\$1,000) to Timothy J. Massett for willful violation of Section 301 of the Communications Act of 1934, as amended (“Act”).¹ The noted violations involve Mr. Massett’s operation of an FM broadcast station on the frequency 91.5 MHz without a Commission authorization.

2. On December 11, 2002, the Commission’s Tampa, Florida, Field Office (“Tampa Office”) issued a *Notice of Apparent Liability for Forfeiture* (“NAL”) to Mr. Massett for a forfeiture in the amount of ten thousand dollars (\$10,000).² Mr. Massett responded to the NAL on January 23, 2003.³

II. BACKGROUND

3. On September 11, 2002, agents from the Tampa Office operating an FCC direction-finding vehicle in the Jacksonville, Florida, area, investigated an unidentified radio station broadcasting on frequency 91.5 MHz. The agents determined, the basis of direction-finding techniques, that the source of the unidentified signal on 91.5 MHz was a building located at 406 Chelsea Street in Jacksonville, Florida. The agents determined on the basis of field strength measurements that a Commission authorization was required to operate that station.⁴ The agents inspected the radio station located at 406 Chelsea Street on

¹ 47 U.S.C. § 301.

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332700012 (Enf. Bur., Tampa Office, released December 11, 2002).

³ We are construing Mr. Massett’s filing, which is entitled “Petition to Reconsider Forfeiture,” as a response to the NAL per 47 C.F.R. § 1.80(f)(3).

⁴ *See* 47 C.F.R. § 15.239(b).

the same day. Mr. Massett, who is the lessee of the building, accompanied the agents during the inspection. Mr. Massett showed the agents an FM broadcast transmitter and the associated audio equipment and then deactivated the transmitter. When the agents asked Mr. Massett whether he had a license authorizing operation of the radio station, he responded that he did not. Mr. Massett admitted that he participated in the operation of the station by resetting the station's CD player when the music stopped just prior to the agents' inspection.

4. On December 11, 2002, the Tampa Office issued the subject *NAL* to Mr. Massett for willfully violating Section 301 of the Act. In his response, Mr. Massett requests cancellation of the proposed monetary forfeiture. He asserts that he has "banned those responsible for the transmissions from ever repeating their act at 406 Chelsea St." and that, although he was "partially responsible" for the operation of the unlicensed station at 406 Chelsea Street, he did not own the station's radio apparatus and the station's operation was "not entirely" under his control. Mr. Massett argues that the proposed monetary forfeiture should be cancelled because of his "low degree of culpability"; that he should have received a warning letter or citation before the issuance of the *NAL*; that he has no history of prior offenses; and that he is unable to pay the proposed forfeiture. To support his inability to pay claim, Mr. Massett submitted copies of his 2000 and 2001 federal income tax returns.

III. DISCUSSION

5. The proposed forfeiture amount in this case is being assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended ("Act"),⁵ Section 1.80 of the Rules,⁶ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Policy Statement*"). Section 503(b) of the Act requires that the Commission, in examining Mr. Massett's response, take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.⁷

6. Section 301 of the Act prohibits unauthorized radio operation. Although Mr. Massett may not be the principal operator of the unlicensed radio station located at 406 Chelsea Street, Jacksonville, Florida, he is the lessee of 406 Chelsea Street and participated in the station's operation on September 11, 2002. We conclude that Mr. Massett willfully⁸ violated Section 301 of the Act.

⁵ 47 U.S.C. § 503(b).

⁶ 47 C.F.R. § 1.80.

⁷ 47 U.S.C. § 503(b)(2)(D).

⁸ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful,' ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act" See *Southern California Broadcasting Co.*, *supra*.

7. Mr. Massett contends that the proposed forfeiture should be cancelled because of his “low degree of culpability.” Mr. Massett cites *James N. Dispoto*, 15 FCC Rcd 10171 (Enf. Bur. 2000) in support of his position. We do not agree that Mr. Massett’s degree of culpability is “low.” Mr. Massett permitted the operation of an unauthorized radio station on his leased premises and participated in the operation of the station. He, therefore, bears significant responsibility for the station’s operation. In the Dispoto case, the Enforcement Bureau imposed a forfeiture on James N. Dispoto for unlicensed operation from his parents’ residence after the cancellation of a *NAL* issued to Mr. Dispoto’s parents for the same operation. While the *NAL* issued to Mr. and Mrs. Dispoto was cancelled, the cancellation was not based on their “low degree of culpability” for the violation.⁹ Therefore, we do not believe that cancellation of the forfeiture against Mr. and Mrs. Dispoto supports cancellation of the subject forfeiture. We conclude that the proposed forfeiture should not be cancelled or reduced because of Mr. Massett’s “low degree of culpability.”

8. The Enforcement Bureau is authorized to issue *NALs* without first issuing citations to persons, such as Mr. Massett, who engage in activities for which a Commission license is required. See Section 503(b)(5) of the Act and Section 1.80(d) of the Rules.¹⁰

9. No mitigation is warranted on the basis of Mr. Massett’s correction of the violation. As the Commission stated in *Seawest Yacht Brokers*, 9 FCC Rcd 6099, 6099 (1994), “corrective action taken to come into compliance with Commission rules or policy is expected, and does not nullify or mitigate any prior forfeitures or violations.”¹¹

10. Mr. Massett claims a history of overall compliance with the Commission’s Rules.¹² However, in light of the fact that Mr. Massett is not a Commission licensee, we do not believe he has any history with the Commission upon which a history of overall compliance cancellation can be based.¹³

⁹ The *Order* canceling the *NAL* issued to Mr. and Mrs. James Dispoto made no determination regarding their degree of culpability for the violation. *Mr. and Mrs. James Dispoto*, NAL/Acct. No. 815TP0005 (Compl. and Info. Bur., Tampa Office, released December 9, 1998). The Tampa Office, at the time of issuance of the *NAL* to Mr. and Mrs. Dispoto, believed that their son, James N. Dispoto, was a minor and therefore could not be held individually liable for a forfeiture. The cancellation and reissuance to James N. Dispoto resulted from receipt of information from Mr. and Mrs. Dispoto that James N. Dispoto was an adult, not a minor, and the subsequent determination that he could, therefore, be held individually liable for the forfeiture.

¹⁰ 47 U.S.C. § 503(b)(5) and 47 C.F.R. § 1.80(d).

¹¹ See also *Callais Cablevision, Inc.*, 17 FCC Rcd 22626, 22629 (2002); *Radio Station KGVJ, Inc.*, 42 FCC 2d 258, 259 (1973); and *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966).

¹² Mr. Massett cites the following cases as support for cancellation of the proposed monetary forfeiture based on his lack of a history of prior offenses: *Letter to Michael A. Porter*, NAL/Acct. No. 915TP0002 (Compl. & Info. Bur., issued March 19, 1999); *Jeffrey Alan Pettrey*, 16 FCC Rcd 22088 (Enf. Bur. 2001); and *Networx Corporation*, 17 FCC Rcd 10572 (Enf. Bur. 2002). None of the cited cases involves a cancellation of a forfeiture based on a history of overall compliance assertion. Further, the case at hand is factually dissimilar to the cited cases, in which the cancellations resulted, respectively, from prior enforcement action having been taken for unlicensed operation; inability to pay; and a substantive determination that the record did not support issuance of the monetary forfeiture.

¹³ See *Odino Joseph*, 18 FCC Rcd 16522, 16524 (Enf. Bur. 2003).

11. Mr. Massett contends that payment of the proposed forfeiture amount of \$10,000 would be a financial hardship. In support of this contention, Mr. Massett submits copies of his federal income tax returns.¹⁴ The Commission has determined that, in general, gross revenues are the best indicator of ability to pay a forfeiture.¹⁵ Upon review of this financial documentation, we conclude that the forfeiture amount should be reduced to \$1,000.¹⁶

12. We have examined Mr. Massett's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Policy Statement* as well. As a result of our review, we conclude that Mr. Massett willfully violated Section 301 of the Act and we find that, while there is no basis for cancellation of the proposed monetary forfeiture, a reduction to \$1,000 is warranted on the basis of financial hardship.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,¹⁷ Mr. Massett **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of one thousand dollars (\$1,000) for willfully violating Section 301 of the Act.

14. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁸ Payment may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should reference NAL/Acct. No. 200332700012 and FRN 0007965379. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁹

¹⁴ Additionally Mr. Massett cites to *Philius Nicolas*, 17 FCC Rcd 23779 (Enf. Bur. 2002), arguing that his proposed forfeiture should be cancelled because his alleged unlicensed operation occurred only once whereas Philius Nicolas operated without a license on multiple occasions. We do not agree. The number of instances of unlicensed operation is immaterial, because the reduction in both this case, as indicated above, and in *Philius Nicolas* was based solely on the inability to pay an amount larger than \$1,000.

¹⁵ See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089 (1992).

¹⁶ *Id.* at 2089 (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues); *Hoosier Broadcasting Corporation*, 15 FCC Rcd 8640, 8641 (Enf. Bur. 2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues); *Afton Communications Corp.*, 7 FCC Rcd 6741 (Com. Car. Bur. 1992) (forfeiture not deemed excessive where it represented approximately 3.9 percent of the violator's gross revenues).

¹⁷ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

¹⁸ 47 U.S.C. § 504(a).

¹⁹ See 47 C.F.R. § 1.1914.

15. **IT IS FURTHER ORDERED THAT** a copy of this *Order* shall be sent by regular mail and Certified Mail Return Receipt Requested to Timothy J. Massett, 2753 Downing Street, Jacksonville, Florida 32205.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau